Supreme Court, U.S.
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83-2085

No. .....

In the Supreme Court of the United States

October Term, 1983

DAVID GARY CHAMPEAU,
Petitioner,

v.

THE STATE OF OKLAHOMA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS FOR THE STATE OF OKLAHOMA

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June, 1984

QUESTIONS PRESENTED

1. Can an appellate court, consistent with the Fourth and Fourteenth Amendments to the United States Constitution, raise standing on its own motion and thereby refuse to decide search and seizure issues on their merits, where the following circumstances exist:

a. the prosecution has never at any stage argued that the appellant was altogether without standing;

b. the prosecution argued at one point in the trial court that the appellant was living on the premises which were searched;

c. the appellate court has determined that the sworn facts in the record do not demonstrate adequately that the appellant has standing?

2. If the appellate court can raise standing on its own motion under these circumstances, do the Fourth and Fourteenth Amendments require that the case be remanded for an evidentiary hearing as to the standing issue?

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No. .....

In the Supreme Court of the United States

October Term, 1983

DAVID GARY CHAMPEAU,
Petitioner

v.

THE STATE OF OKLAHOMA,
Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF OKLAHOMA

The Petitioner, Gary David Champeau, requests that a writ of certiorari issue to review the judgment of the Court of Criminal Appeals of Oklahoma entered in this case on March 2, 1982.

OPINION BELOW

The opinion of the Court of Criminal Appeals of Oklahoma, which is reported at 678 P.2d 1192 (Okla. Cr. 1984), appears in Appendix A. No opinions were rendered by the trial court.

JURISDICTION

The petitioner is seeking a writ of certiorari to the Court of Criminal Appeals of Oklahoma in order to review a judgment entered on February 15, 1984. A timely petition for rehearing was denied on April 17, 1984, and this petition for certiorari was filed within sixty days of that date. Jurisdiction is invoked under 28 U.S.C. §1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. United States Constitution, amendment IV, provides: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

2. United States Constitution, amendment XIV, section 1, provides in pertinent part: ". . . nor shall any State deprive any person of life, liberty or property, without due process of law . . .."

3. Oklahoma Statutes, 1981, Title 63, Section 2-401, provides in pertinent part:

> "A. Except as authorized by the Uniform Controlled Dangerous Substances Act, it shall be unlawful for a person: 1. To manufacture, distribute, dispense, or possess with intent to manufacture, distribute or dispense, a controlled dangerous substance."

4. Oklahoma Statutes, 1981, Title 63, Section 2-509, provides in pertinent part: "It shall be unlawful for any person to cultivate or produce, or to knowingly permit the cultivation, production, or wild growing of any species of such plants, on any lands owned or controlled by such person . . .."

STATEMENT OF THE CASE

The Petitioner was accused in the District Court of Pottawatomie County, Oklahoma, 63 Okla. Stat. §§2-402. 2-509 (1981), of cultivation of marijuana and possession of marijuana with intent to distribute (R. 3).* A trial jury found the Petitioner guilty as to both counts and assessed punishment at ten (10) years imprisonment and a fine of Twenty-Five Thousand Dollars ($25,000.00) as to the cultivation count and assessed punishment at ten (10) years imprisonment and a fine of Five Thousand Dollars ($5,000.00) as to the possession count (Tr. 305-06).

Officers executed a search warrant at a rural Pottawatomie County location on October 23, 1980 (Tr. 35). Upon the officers announcing the purpose of their visit over a public address system, the Petitioner emerged from a trailer home on the property (Tr. 179). Officers seized marijuana, marijuana drying racks, and related items in the trailer home (Tr. 38-39). Mail addressed to the Petitioner was inside the trailer home (Tr. 38-39), as were photographs of the Petitioner and others in a marijuana field (Tr. 94-96).

The officers also searched a semi-trailer about eighty yards from the trailer home and seized from it marijuana and marijuana processing paraphernalia (Tr. 41-42). Officers also seized marijuana from two fields about a hundred yards from the trailer home (Tr. 45). There was an irrigation system for the fields operated from a pump house near the trailer home (Tr. 47). Vehicles were also searched.

The Petitioner raised illegal search and seizure issues at preliminary hearing, in a subsequent motion to suppress, at a hearing on the motion to suppress, at trial, and on appeal. At preliminary hearing the State argued: "First, in regarding to Mr. Champeau, he was living on the premises in the trailer . . . (PH. Tr. 380).

The Petitioner appealed his conviction to the Court of Criminal Appeals of Oklahoma, where the issue of Petitioner's personal interest in the property searched was raised for the first time by the appellate court on its own motion. The State argued on appeal—in response to Petitioner's argument that the marijuana patches were not open fields—that there was no reasonable expectation of privacy in the fields. However, the State never argued that Petitioner lacked a possessory interest in any items seized.

The Court of Criminal Appeals in determining lack of standing made no reference to the open fields doctrine and relied on the alleged fact that the evidence did not show who owned or had lawful possession of the premises.

*The record in the Court of Criminal Appeals of Oklahoma comprises a bound record, consisting of instruments filed in the trial court (hereafter referred to as R.), a trial transcript (heaeafter referred to as Tr.) and a preliminary transcript (hereafter referred to as PH.).

HOW THE FEDERAL QUESTIONS WERE RAISED AND DECIDED BELOW

The federal questions were raised in a timely petition for rehearing which is attached hereto as Appendix B.

The federal questions at issue here were not created until the Court of Criminal Appeals raised standing on its own motion and thus these questions were not raised at the trial level.

The Court of Criminal Appeals did not issue an opinion in denying the petition for rehearing. The Court's order denying the petition for rehearing is attached hereto as Appendix C.

Although these particular federal questions were not raised at the trial level or in existence at that time, the Petitioner raised search-and-seizure issues at preliminary hearing, in a pretrial motion to suppress, in a hearing on the motion to suppress, and at trial.

REASONS FOR GRANTING THE WRIT

I. The Decision Below, and the Decision of a Federal Circuit Court, Are Inconsistent With the Decisions of Other Appellate Courts.

The question raised by the Court of Criminal Appeals's handling of the standing issue is an important one, as indicated by the number of decisions interpreting *Steagald v. United States,* 451 U.S. 204 (1981) and *Combs v. United States,* 408 U.S. 224 (1972). The lower Courts have interpreted these cases variously.

In *Steagald,* where the government failed to raise standing in any manner until the case reached the United States Supreme Court and in which the government had made contentions which would have shown the petitioner to have standing, this Court decided that the government had waived standing. 408 U.S. at 209.

In *Combs,* where the government had failed to raise standing at a pretrial hearing, this Court remanded the case for an evidentiary hearing on the standing issue. 408 U.S. at 227-28.

The first Circuit appears to have taken a position similar to that of the Oklahoma Court of Criminal Appeals. Even though the First Circuit recognized the existence of *Steagald,* the First Circuit Court indicated that it believed the defendant actually to have demonstrated standing in *Steagald.* Thus, the Court decided that the State did not waive standing by failing to challenge it below because the defendant had failed to meet his initial burden of showing standing. *United States v. Irizarry,* 673 F.2d 554, 557 (1st Cir. 1982).

Other courts variously have found that, when the standing issue was not raised below that the government waived the standing issue, that a remand for an evidentiary hearing was necessary, or that the failure to raise did not matter because of some distinction between that case being decided and the *Steagald* and *Combs* cases.

Other circuit courts, following *Steagald,* appear to have decided flatly that when the government did not raise the standing issue below, the appellate court must assume that standing existed. *United States v. Mendoza,* 722 F.2d 96, 97n.1 (5th Cir. 1983); *United States v. Johns,* 707 F.2d 1093, 1100 n.6 (9th Cir. 1983).

The Eleventh Circuit appears to have decided once that the government could raise standing for the first time on appeal when it did not acquiesce in a determination of standing at the trial level. *United States v. Braithwaite,* 709 F.2d 1450, 1453 (11th Cir. 1983), *cert. denied,* _____ U.S. _____, 103 S.Ct. 266 (1983). However the same Court of Appeals, citing *Steagald,* has held that a claim of "reasonable suspicion" is waived if the State fails to urge the claim at the trial level and offers no justification for this failure.

The Tenth Circuit has decided that neither a waiver under *Steagald* nor a remand under *Combs* is appropriate when the government's failure to raise standing at the trial level is accom-

panied by lack of conflicting positions on the part of the government, a confusing manner of raising issues by the defendants, and enough evidence in the record to address meaningfully the standing issue. *United States v. Hansen,* 652 F.2d 1374, 1382-83 (10th Cir. 1981).

The Second Circuit, in a case decided prior to *Steagald,* determined that the government's failure to raise standing below did not require a remand under *Combs* because the government itself did not request the factfinding. *United States v. Smith,* 621 F.2d 483 (2d Cir. 1980).

Although none of the federal Court of Appeals cases involve instances of an appellate court taking the unusual step of raising standing for the first time on its own motion, these cases, like the Petitioner's case, involve the failure of the State to raise standing prior to appeal. This issue is necessarily an included issue within the first issue set forth in Petitioner's "Questions Presented." The Court of Appeals cases demonstrate that there is a substantial divergence among the appellate courts as to standing to raise standing.

II. The "Standing to Raise Standing" Issue Is an Important One Which Will Arise Repeatedly and Which Involved Important Competing Interests Which Must Be Balanced.

The importance of the questions presented here are demonstrated above by the number of cases which have addressed the "standing to raise standing" issue. Most of the cases were decided with reference to the fairly recent *Steagald* case and *Steagald* has been interpreted in a number of additional cases not cited above.

Moreover, the importance of the questions presented here is demonstrated by the competing, but important and compatible, principles of requiring the accused to let his positions be known below and requiring the government to let its positions be known below. On the one hand is *Rakas v. Illinois,* 439 U.S. 128 (1978) which indicates that the accused has the burden of demonstrating that he has standing. On the other hand, is

Steagald, which indicates that the government, at least under some circumstances, waives standing by not raising it below. Obviously, it is important to allow neither the government nor the accused to lay behind a log and resolution of the competing interests is necessary so that parties will know how to proceed and so that a balance may be achieved.

Petitioner has suggested in the request for rehearing in the Oklahoma Court of Criminal Appeals, that this issue is similar to the warrantless arrest issue, as to which the government has the burden, but only after the defense first raises the issue. Similarly, it would make sense for the defense to have to meet its burden as to standing only at such time as the government raises the issue. Regardless, of the method of balancing the *Rakas* considerations with the *Steagald* considerations, litigants and courts should be apprised of when there is "standing to raise standing" on appeal and when an appellate court can consider standing on appeal.

CONCLUSION

For the reasons stated, the Petitioner requests that a writ of certiorari be granted.

Respectfully submitted,

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June, 1984

APPENDIX A

FOR PUBLICATION

[Filed Feb. 15, 1984]

IN THE COURT OF CRIMINAL APPEALS
OF THE STATE OF OKLAHOMA

DAVID GARY CHAMPEAU, Appellant,	)	
-vs-	)	No. F-82-493
THE STATE OF OKLAHOMA, Appellee.	)	

OPINION

CORNISH, Judge:

David Gary Champeau and two co-defendants were convicted of Unlawful Cultivation of Marijuana and Possession of Marijuana With Intent to Distribute. Champeau was sentenced to two consecutive ten-year prison terms, and fines of $25,000 and $5,000, respectively.

I

On appeal, he contends that the evidence was insufficient to support the verdicts. The evidence at trial established the following: on the morning of October 2, 1980, lawmen acting on a tip followed one of the appellant's co-defendants from a residence in Norman, Oklahoma, to a tract of land in Pottawatomie County. A second co-defendant arrived shortly thereafter. The men were seen entering the land through what appeared to be a locked gate. Based upon information from a confidential informant, their own observations, and an aerial inspection of the property, the officers obtained a search warrant.

The officers were forced to break a key operated padlock on the gate in order to enter the fenced property and execute the warrant. In response to their command, appellant exited a house trailer on the land. The co-defendants were later seen driving past the property in a pickup truck, and were apprehended a few miles away.

The search of the house trailer revealed drying racks in the bedroom and cut marijuana. A semi-trailer eighty yards northwest of the house trailer contained additional drying racks and marijuana. Two fields of marijuana were discovered one hundred yards west of the house trailer. The fields were irrigated by means of water sprinklers elevated on poles six or seven feet above the ground, connected to water hoses controlled from a pump house near the house trailer. A total of four tons of marijuana was seized from the tract.

Bills and a piece of mail bearing appellant's name and a Norman address were found in the living room of the house trailer. The mail was propped against a wall behind two jars containing marijuana, one of which was labeled "stash." Several photographs were seized from the living room. One showed appellant seated on the couch in the living room, shirtless and smoking a cigarette. The others depicted appellant and/or his co-defendants posing in the midst of tall plants identified as marijuana.

Under the facts of this case,

> [w]here a person is present in premises where marijuana is found, but does not have exclusive access, use, or possession of the premises, it may not be inferred that he had knowledge of the presence of marijuana and had control of it unless there are additional independent factors showing his knowledge and control.

Brown v. State, 481 P.2d 475 (Okl.Cr.1971), Syllabus 3. We find sufficient additional factors beyond appellant's mere presence on the premises to indicate his knowledge and at least joint control of the contraband. He was within a locked compound containing fields of growing marijuana and structures with processing facilities. At the time of the raid he was the sole occupant of the house trailer. Personal papers, including the three week old letter, were in the living room of the trailer. Photographic evidence depicted appellant and the co-defendants in a field of growing marijuana plants. Moreover, the sheer quantity of drug seized, coupled with the large quantity of small plastic bags found in the house trailer and scales in the semi-trailer, support a finding of intent to distribute.

The evidence was also sufficient to establish that appellant unlawfully cultivated marijuana on land under his control, 63 O.S.1981, §2-509(1), or aided and abetted such activity, 21 O.S.1981, §172. A cultivation operation was clearly underway on the tract, including irrigation, and appellant's connection with the operation was sufficiently shown. Especially significant in this regard are the photographs, one of which depicts appellant apparently measuring the length of a branch of one plant with his forearm.

II

Appellant challenges the admission of the evidence against him. He argues that the photographs were not sufficiently connected with the property in question. He states that he was clean shaven in the photographs but heavily bearded at the time of arrest, indicating a substantial length of time between the photos and the events in question. It is sufficient to point out that the photographs actually show that appellant was at least partially bearded at the time they were taken. State's Exhibits Nos. 36, 37, 38 and 39.

Appellant also argues that the photographs were not proven to depict the land in question. The probative value of photographs depends upon their accuracy, and they must be

shown by extrinsic evidence to be faithful representations of the place or subject as it existed at the time involved in the controversy. *Shockey v. State,* 524 P.2d 33 (Okl.Cr.1974). However, preliminary questions concerning the admissibility of evidence shall be determined by the trial court, subject to the provision that when the relevancy of evidence depends upon the fulfillment of a condition of fact, the judge shall admit it upon, or subject to, the introduction of evidence sufficient to support a finding of the fulfillment of the condition. 12 O.S.1981, §2105(A) and (B).

We find sufficient evidence to support the admission of the photographs. In the backgound of one of the pictures is a device atop a pole several feet above the ground similar to the elevated irrigation devices found on the land in question. Compare State's Exhibit No. 36 with State's Exhibits Nos. 7, 8 and 13. Moreover, that the photographs depict the same three men amid growing marijuana as were arrested on or near the land in question, and that the photographs were found on the premises, are highly significant.

III

Finally, appellant argues that all the evidence seized pursuant to the search warrant should have been suppressed due to the unconstitutionality of the search. We find it unnecessary to consider his arguments in this regard, since he has failed to show that his personal rights were violated in any manner.

With regard to appellant's Fourth Amendment contentions, whether the appellant had standing to bring a Fourth Amendment challenge must first be determined before inquiry can be made concerning violation of his Fourth Amendment rights. *Meeks v. State,* 637 P.2d 1259 (Okla.Cr.1981). Champeau had the burden of proving that he had a legitimate expectation of privacy in the area searched. The test applied by this Court derives from Justice Harlan's concurring opinion in *Katz v. United States,* 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967), and involves the two-fold requirement that the person have exhibited an actual, subjective expectation of privacy,

and that the expectation be one that society is prepared to recognize as reasonable. *Edwards v. State,* 651 P.2d 1335 (Okl.Cr.1982). (quoting from *Finch v. State,* 644 P.2d 1378 (Okl.Cr.1982) More than a subjective expectation of not being discovered is required. Legitimation of expectations of privacy arise either by reference to concepts of real or personal property law or to understandings that are recognized and permitted by society. *Rakas v. Illinois,* 439 U.S. 128, 143, 99 S.Ct. 421, 430-431, 58 L.Ed.2d 387 (1978), Note 12. Wrongful presence is not sufficient.

Okla. Const. Art. II, §30 has incorporated word for word the Fourth Amendment to the United States Constitution. *Tate v. State,* 544 P.2d 531 (Okl.Cr.1975). The rights conferred by that provision are personal to the owner or occupant of the premises searched. One accused of a crime may not object that a search is unlawful where he does not contend that he has possession of the property of premises searched. *Sanders v. State,* 351 P.2d 1079 (Okl.Cr.1960). The character of the requisite occupancy or possession is clearly suggested in *Ellsworth v. State,* 295 P.2d 296 (Okl.Cr.1956), Syllabus No. 4:

> Where the evidence, on a motion to suppress, supports the defendant's claim that he had *lawful possession* of the automobile, or a *proprietary interest* therein, a search predicated upon an unlawful arrest, based upon suspicion, is void ab initio.

(Emphasis added.) In *Martin v. State,* 375 P.2d 481 (Okl,Cr.1962), we held that where the defendant never at any time claimed ownership or legal custody or control of the place searched—an automobile—and where evidence of ownership or proprietary interest was objected to by the defendant and never shown, a search and seizure could not be considered a violation of the defendant's constitutional rights.

In the case at bar, the motion to suppress was decided on the testimony of the prosecution witnesses at the preliminary hearing. None of the defendants testified. There is no evidence as to the ownership of the land and structures in question, nor as to who was in lawful possession. There is no indication by

what right or under what circumstances appellant and his co-defendants were present on the land.

An analogous situation obtained in *Goehring v. State,* 627 S.W.2d 159 (Tex.Cr.App. 1982), where the defendant challenged on constitutional grounds the seizure of a large quantity of marijuana from a ranch on which he resided. The Court stated:

> Only two pertinent facts appear in the record; appellant was seen working with a hoe in a field of growing marijuana plants, and lived in a house separate from that of Jarvis on the ranch premises. The record does not reveal appellant's interest in the residence where he was living at the time, i.e. whether he leased it, resided there as a guest, received lodging on account of his employment on the ranch, or was merely trespassing on the property. Nor, are we informed of the duration of his residence on the ranch; he may have been there for one or more days prior to the seizure of the marijuana. We also do not know the number of persons who may have resided on the ranch, had access to the ranch or whether appellant had any authority to exclude others from the premises.
>
> * * *
>
> Although in this cause appellant filed and argued a motion to suppress evidence, we find that the following language from *Lewis* is otherwise applicable to our facts:
>
> > There was no motion to suppress the evidence complained of, and thus no attempt to offer evidence from appellant or any other competent source as to what relationship existed between appellant and the premises at the time the officers entered. *There may have been such a relationship, but appellant failed to establish its existence as he was required to do.* 598 S.W.2d at 283 (Emphasis added).

Id., at 164-165. (Footnotes omitted).

In the case at bar, there is simply no evidence from which we may determine the legitimacy of appellant's subjective expectation of privacy, if any, nor the character of his possession or interest in the premises. Accordingly, appellant's challenge to the constitutionality of the search and seizure must fail.

IV

The judgments and sentences are AFFIRMED.

GARY DAVID CHAMPEAU, Appellant, was convicted by a jury in Pottawatomie County District Court Case No. CRF-80-290 of Unlawful Cultivation of Marijuana and Unlawful Possession of Marijuana with Intent to Distribute. He was sentenced by the Hon. Glenn Dale Carter to ten (10) years in prison and a Twenty-Five Thousand Dollar ($25,000.00) fine, and ten (10) years in prison and a Five Thousand Dollar ($5,000.00) fine, respectively, in accordance with the verdict. On appeal, the Judgment and Sentence is AFFIRMED.

AN APPEAL FROM THE DISTRICT COURT OF
POTTAWATOMIE COUNTY, OKLAHOMA
THE HONORABLE GLENN DALE CARTER,
ASSOCIATE DISTRICT JUDGE

APPENDIX B

[Filed March 6, 1984]

IN THE COURT OF CRIMINAL APPEALS
OF THE STATE OF OKLAHOMA

DAVID GARY CHAMPEAU, Appellant,	)	
vs.	)	No. F-82-493
THE STATE OF OKLAHOMA, Appellee.	)	

PETITION FOR REHEARING

The Appellant, David Gary Champeau, appears by his attorney and petitions for the following reasons: (1) Under the protections against unreasonable searches and seizures contained in the Fourth Amendment to the United States Constitution and in Article II, section 30 of the Oklahoma Constitution and under the due process clause of the federal constitution's Fourteenth Amendment, it was impermissible for this Court to consider for the first time on appeal the issue of whether Mr. Champeau had standing to object to the searches and seizures on the property where he was staying—if standing can be considered at all at this juncture, Mr. Champeau is entitled to a hearing at which he can present evidence in regard to the standing issue; (2) facts which already exist in the record are sufficient to show that, under Article II, section 30 of the Oklahoma Constitution and under the Fourth Amendment to the United States Constitution, Mr. Champeau had standing to object to the illegal searches and seizures in and around the residence where he was staying.

I

In Mr. Champeau's case, the State did not contend at the trial level that Mr. Champeau had not standing to contest the legality of the searches and seizures in and around the trailer house where the Appellant was staying. In fact the state went straight to the merits of the issues on the motions to suppress at preliminary hearing (PH.Tr. 379-80), at the hearing on the motions to suppress (M.Tr. 17-18), and at trial (Tr. 7). Authority from this Court provides that the State, like the defense, may waive issues by not presenting them at the trial level. *e.g., State v. Edens,* 565 P.2d 51 (Okl.Cr. 1977). Regardless, the United States Supreme Court specifically has ruled that where the government has not raised the standing issue at trial, the defendant at the very least is entitled to a hearing at which the standing issue can be determined. In *Combs v. United States,* 408 U.S. 224, 92 S.Ct. 2284 (1972), the Supreme Court stated that where the defendant's failure to make a showing of standing could be explained the State's failure to challenge standing at a pretrial hearing, the appropriate procedure was to remand the case for a hearing on the defendant's standing. The Court stated:

> In any event, the record now before us is virtually barren of the facts necessary to determine whether petitioner had an interest in connection with the searched premises that gave rise to "a reasonable expectation (on his part) of freedom from governmental intrusion" upon those premises. *Mancusi v. DeForte,* 392 U.S. 364, 368, 88 S.Ct. 2120, 2124, 20 L.Ed.2d 1154 (1968). If petitioner can establish facts showing such an interest, he will have demonstrated a basis for standing to attack the search; re-examination of the validity of the warrant in light of the Government's present position on that issue would then be appropriate to resolve the question whether evidence of the seized whiskey was properly introduced at petitioner's trial.

> Since there has not yet been any factual determination of whether petitioner had an interest in the searched premises that was protectible under the doctrine of *Mancuisi v. DeForte,* we vacate the judgment of the Court of Appeals and remand with directions that the case be sent back to the District Court for further proceedings consistent with this opinion.

Id. at 227-28, 92 S.Ct. at 2286. If standing is to be considered on appeal without an opportunity to the defendant to present evidence in regard to this newly-raised issue, the Appellant clearly has not been allowed the full and fair litigation of a search-and-seizure issue which is required by the federal constitution's Fourth Amendment. See *Stone v. Powell,* 428 U.S. 465 96 S.Ct. 3037 (1976). See also *Townsend v. Sain,* 372 U.S. 293, 83 S.Ct. 745 (1963). The due process clause of the Fourteenth Amendment to the United States Constitution clearly is offended when the prosecution seeks to change its theories on appeal and the new theory is a matter as to which the defendant had a right to be heard. See *Cole v. Arkansas,* 333 U.S. 196, 68 S.Ct. 514 (1948).

Clearly, the burden is on the defendant to establish that he has standing. *Alderman v. United States,* 394 U.S 165, 89 S.Ct. 961 (1969). However, the *Combs* case makes it clear that this burden arises only at such time as the prosecution raises the standing issue, just as the defense first must raise a warrantless search and seizure issue to place the burden on the government. See *United States v. Jeffers,* 342 U.S. 48, 72 S.Ct. 93 (1951).

Thus, if the State has not waived the standing issue in its entirety, the Appellant at the very least is entitled to a hearing at which he can present facts showing that he has standing to challenge the Fourth Amendment issues.

Proposition III of Appellant's Brief in Chief demonstrates that the illegal searches and seizures in this case will require reversal for the same reasons that this Court identified in the companion case of *Hightower v. State,* Case No. F-82-490 (Okl.Cr.—Nov. 22, 1983).

II

Even though the State did not raise the standing at the trial level, facts exist in the record which demonstrate that Mr. Champeau had standing to raise the Fourth Amendment issues which he raised on this appeal. For example, there was evidence of mail addressed to Mr. Champeau being the trailer home, (Tr. 40), evidence of the Apellant's pictures being in the trailer home (Tr. 77-78), and evidence that the premises' privacy was protected by means of a key-operated padlock on the gate (Tr. 36). As this Court noted in its previous opinion, Mr. Champeau was the only person at the trailer home at the time the officers made the raid.

This Court previously has stated that standing existed under similar circumstances. In *Nunley v. State,* 660 P.2d 1052 (Okl.Cr. 1983) this Court deemed the State's standing arguments to have "no merit" when the defendant occupied the premises off and on with a woman who paid the bills. Clearly, the defendant need not show ownership and the Supreme Court has decreed using "arcane concepts of property law" in determining standing issues. Mr. Champeau has shown a reasonable expectation of privacy in the searched premises and such is all that is required under the federal constitution's Fourth Amendment. *Katz v. United States,* 389 U.S. 347, 88 S.Ct. 507 (1967). See *Rawlings v. Kentucky,* 448 U.S. 98, 100 S.Ct. 2556 (1980)(ccmmentary regarding "arcane concepts of property law").

Therefore, Mr. Champeau had standing to complain of Fourth Amendment violations and this Court should reverse for the reasons stated in Appellant's Brief in Chief, with particular attention being warranted in regard to Proposition III and this Court's holding in *Hightower v. State,* Case No. F-82-490 (Okl.Cr.—Nov. 22, 1983).

CONCLUSION

For the reasons stated above, this Court should reverse Mr. Champeau's convictions with instructions to dismiss since without the illegally obtained evidence the State had no basis for prosecuting the Appellant. In the first alternative, it is requested that the convictions be reversed for a new trial. In the second alternative, it is requested that this case be remanded for a hearing on the standing issue.

Respectfully submitted,
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CERTIFICATE OF DELIVERY

I, Mark Barrett, certify that on this sixth day of March, 1984 a true and correct copy of the above and foregoing petition for rehearing was delivered to the Office of the Attorney General, Oklahoma State Capitol Building, Oklahoma City, Oklahoma.

MARK BARRETT

APPENDIX C

[Filed April 17, 1984]

IN THE COURT OF CRIMINAL APPEALS
OF THE STATE OF OKLAHOMA

ORDER

NOW on this 17th day of April, 1984, having examined the petitions for rehearing in the following cases, to wit:

F-82-320, RONALD WAYNE CLARK v. THE STATE OF OKLAHOMA
F-82-332, RICKY ROUNDS v. THE STATE OF OKLAHOMA
F-82-493, DAVID GARY CHAMPEAU v. THE STATE OF OKLAHOMA
F-82-508, PHILLIP LEE ABRAHAM v. THE STATE OF OKLAHOMA
F-82-533, DOYLE ALLEN v. THE STATE OF OKLAHOMA
F-82-596, CARRY BRENT MILLS v. THE STATE OF OKLAHOMA
F-83-51, FLOYD GUTHRIE v. THE STATE OF OKLAHOMA
F-83-128, REUBEN JUNIOR ROBERTS v. THE STATE OF OKLAHOMA
F-83-295, CLAUDE GILBERT JEFFRIES v. THE STATE OF OKLAHOMA

this Court finds that they should be and the same hereby are DENIED. The Clerk of this Court is directed to issue the mandates forthwith.

IT IS SO ORDERED.

WITNESS OUR HANDS AND THE SEAL OF THIS COURT this 17th day of April, 1984.

HEZ J. BUSSEY,
PRESIDING JUDGE

TOM BRETT,
JUDGE

Office-Supreme Court, U.S.
FILED
SEP 19 1984
ALEXANDER L. STEVAS,
CLERK

No. 83-2085

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

DAVID GARY CHAMPEAU
Petitioner,
v.
THE STATE OF OKLAHOMA
Respondent.

On Petition for a Writ of Certiorari
to the Court of Criminal Appeals
of the State of Oklahoma

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. May an appellant, in instances where he has specifically failed to show standing to bring a Fourth Amendment challenge, still raise the issue of the constitutionality of the search.

2. Does an appellate court, consistent with the Fourth and Fourteenth Amendments to the United States Constitution, have the power to raise the issue of standing on its own motion.

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RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

The Respondent, State of Oklahoma, by and through Michael C. Turpen, Attorney General of the State of Oklahoma, respectfully requests that this Court deny the petition for writ of certiorari seeking review of the Opinion of the Court of Criminal Appeals of the State

of Oklahoma entered on February 15, 1984, and to which rehearing was denied on April 17, 1984.

OPINION BELOW

The Opinion of the Oklahoma Court of Criminal Appeals is reported at 678 P.2d 1192 (Okl.Cr. 1984).

JURISDICTION

This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourteenth Amendment to the United States Constitution provides in part:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or

> affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

The Fourteenth Amendment, section 1, to the United States Constitution provides, in part, as follows:

> ". . . [N]or shall any State deprive any person of life, liberty or property, without due process of law. . . ."

Title 63 O.S.1981, § 2-204 provides, in part, as follows:

> "A. Except as authorized by the Uniform Controlled Dangerous Substances Act, it shall be unlawful for a person: 1. To manufacture, distribute, dispense, or possess with intent to manufacture, distribute or dispense, a controlled dangerous substance."

Title 63 O.S.1981, § 2-509 provides, in part, as follows:

> "All species of plants from which controlled dangerous substances in Schedules I and II may be derived are hereby declared inimical to health and welfare of the public, and the intent of the Legislature is to control and eradicate these species of the plants in the State of Oklahoma.

> 1. It shall be unlawful for any person to cultivate or produce, or to knowingly permit the cultivation, production, or wild growing of any species of such plants, on any lands owned or controlled by such person, and it is hereby declared the duty of every such person to destroy all such plants found growing on lands owned or controlled by him."

STATEMENT OF THE CASE

Gary David Champeau, [hereinafter referred to as the "Petitioner"], was convicted of the crimes of Unlawful Cultivation of Marijuana in violation of 63 O.S.1981, § 2-509(1) and Unlawful Possession of Marijuana With Intent To Distribute in violation of 63 O.S.1981, § 2-401, in the District Court of Pottawatomie County, State of Oklahoma. The Petitioner was represented by counsel. The jury returned a verdict finding the Petitioner guilty of both counts and sentenced him to ten years in the custody of the Department of Corrections

and a fine of $25,000.00 on the first count, and ten years in the custody of the Department of Corrections and a fine of $5,000.00 on the second count. The trial court sentenced the defendant in accordance with the jury's verdict.

The facts which were presented to the Court reveal that in the course of a marijuana cultivation investigation arising from a tip given by a confidential informant to officers of the Midwest City Police Department, Detective Bill Howard of the Midwest City Police Department and Agent John Guyton of the Oklahoma Bureau of Narcotics and Dangerous Drugs set up surveillance of a residence in Norman, Oklahoma in the early morning hours of October 23, 1980 (Tr. 30; P.H. Tr. 8). These officers observed one of the co-defendants in this case, Terry Hightower, leave this resi-

dence at around 8:00 a.m. (P.H. Tr. 9). The officers then proceeded to maintain a roving surveillance of this co-defendant, following him from the residence in Norman to a rural area in Pottawatomie County, Oklahoma, located on Bethel Road, arriving there at approximately 10:00 a.m. (Tr. 31,33; P.H. tr. 9,10). The officers maintained a surveillance of this site by driving past several times on Bethel Road. A second co-defendant, Robert Hightower, was observed to arrive at this site at approximately 10:30 a.m. (Tr. 34). Shortly after this, agents from the Oklahoma Bureau of Narcotics and Dangerous Drugs (OBNDD) called for a fly-over of this site by other agents trained in detecting marijuana from the air (P.H. Tr. 10,98,99). Upon verification from the agents conducting the fly-over, Agent Guyton and

the other officers proceeded to the Pottawatomie County Court House to obtain a search warrant for the site on Bethel Road (Tr. 35; P.H. Tr. 100). Agent Guyton and Detective Howard prepared the affidavit to obtain the search warrant (P.H. Tr. 23,24,31), and Agent Guyton signed it (O.R. 99,100). A warrant was then issued pursuant to this affidavit.

The search warrant for the residence and premises on Bethel Road was executed between 5:30 p.m. and 6:00 p.m. on this same date of October 23, 1980 (Tr. 35). Agent Guyton, Detective Howard and Trooper Gary Thomas of the Oklahoma Highway Patrol out of Pottawatomie County were in the lead car which approached this site in the process of serving the warrant (Tr. 210; P.H. Tr. 13). Agent Guyton cut the padlock on

the gate blocking the driveway to the site and the group of officers proceeded down the driveway to the mobile home located on the premises (Tr. 36,37). Trooper Thomas announced the purpose of their visit over his unit's public address system and instructed anyone inside to come out and surrender (Tr. 37). The Petitioner was observed at this time to exit the trailer house on the site (Tr. 179). Upon entering the mobile home, the officers found marijuana, marijuana drying racks, and mail addressed to the Petitioner inside the mobile home (Tr. 38,39). Also, lying in plain view, were a group of pictures showing the Petitioner and the two co-defendants frolicking in a large patch of marijuana (Tr. 94-96). Upon further investigation, a large semi-trailer was discovered near the mobile home which con-

tained marijuana and more processing apparatus (Tr. 41,42). Two separate fields of growing marijuana were subsequently discovered approximately one hundred yards west of the mobile home (Tr. 45). In the fields was an irrigation system of PVC pipes and sprinklers connected to a pump house located near the trailer house (Tr. 47). Approximately four tons of marijuana was subsequently seized from the site (Tr. 98).

REASONS WHY THE WRIT SHOULD BE DENIED

PROPOSITION I

THE PETITIONER HAS THE BURDEN TO SHOW STANDING WHEN THE CONSTITUTIONALITY OF A SEARCH IS AT ISSUE; FURTHERMORE, THIS PREVENTS THE PETITIONER FROM ASSERTING ANY EXPECTATION OF PRIVACY ISSUE SINCE HE HAS FAILED TO SHOW ANY PERSONAL INTEREST BEING VIOLATED.

The State contends that the Oklahoma Court of Criminal Appeals properly addressed Petitioner's challege to the

constitutionality of the search. Governmental officials must violate a defendant's legitimate expectation of privacy in order to find an illegal search. Rakas v. Illinois, 439 U.S. 128, 99 S.Ct. 421, 58 L.Ed.2d 387 (1978). However, a criminal defendant has at all times the "burden of proving not only that the search . . . was illegal, but also that he had a legitimate expectation of privacy. . . ." Rawlings v. Kentucky, 448 U.S. 98, 104, 100 S.Ct. 2556, 2561, 65 L.Ed.2d 633 (1980).

Furthermore, in Rakas v. Illinois, supra, the Supreme Court rejected the "automatic standing" argument of Jones v. United States, 362 U.S. 257, 80 S.Ct. 725, 4 L.Ed.2d 697 (1960). "Fourth Amendment rights are personal rights which, like some other constitutional

rights, may not be vicariously asserted." 439 U.S. at 133, citing Alderman v. United States, 394 U.S. 165, 174, 89 S.Ct. 961, 966, 22 L.Ed.2d 176 (1969). A criminal defendant would not not be able to contest the legality of a search by merely being "targeted" by a search. 439 U.S. at 134.

In their opinion below, the Oklahoma Court of Criminal Appeals noted that at the preliminary hearing, neither the Petitioner nor the co-defendants testified as to the ownership of the land or structures. Further, the record was void as to what right or under what circumstances the Petitioner was present on the land searched. Champeau v. State, 678 P.2d 1192, 1195-1197 (Okl.Cr. 1984).

The State would assert that the Petitioner's claim of an illegal search

fails completely due to his inability to show any expectation of privacy. While it may have shown that he had an ownership of the drugs, the State would argue that this alone is not sufficient to show standing. In Rawlings v. Kentucky, supra, the Supreme Court clearly rejected the "notion that 'arcane' concepts of property law ought to control the ability to claim the protections of the Fourth Amendment." 448 U.S. at 105. The Defendant clearly has failed to show any expectation of privacy in the instant case, and therefore, fails to demonstrate standing to challenge the search.

PROPOSITION II

THE DECISION OF THE OKLAHOMA COURT OF CRIMINAL APPEALS IS CONSISTENT WITH EXISTING FOURTH AND FOURTEENTH AMENDMENT LAWS; FURTHERMORE, THIS IS NOT AN APPROPRIATE CASE FOR CERTIORARI SINCE THE CASE WAS PROPERLY INTERPRETED IN ACCORDANCE WITH APPROPRIATE CASE LAW IN THAT THE PETITIONER FAILED TO SHOW STANDING TO RAISE THE SEARCH CONSTITUTIONALITY ISSUE.

The State contends that the issue of the constitutionality of the search was properly disposed of by the Oklahoma Court of Criminal Appeals in that the Petitioner failed to show standing in order to raise the search issue. It is clear that the burden rests on the Petitioner to show a legitimate expectation of privacy. Rawlings v. Kentucky, supra.

This doctrine has been interpreted in a great amount of decisions by the Oklahoma Court of Criminal Appeals. It remains clear that the Court requires the criminal defendant to show a legit-

inmate expectation of privacy in the area searched. Underwood v. State, 659 P.2d 948 (Okl.Cr. 1983); Edwards v. State, 651 P.2d 1335 (Okl.Cr. 1982); Finch v. State, 644 P.2d 1378 (Okl.Cr. 1982).

It is also well-settled in Oklahoma that a criminal defendant's standing to bring a Fourth Amendment challenge must first be determined before inquiry can be made concerning violation of Fourth Amendment rights. Underwood, supra; Meeks v. State, 637 P.2d 1259 (Okl.Cr. 1981).

The State would argue that the decisions of the Oklahoma Court of Criminal Appeals regarding the constitutionality of searches are clear as to the standing requirement. Furthermore, these decisions are based on Rakas v. Illinois, supra, and are expressly de-

tailed in the Court's opinion in the instant case. 678 P.2d at 1195-1196.

The Court raised the issue of Petitioner's lack of standing sua sponte, and the State would assert that it is clearly in the interest of justice for the appellant court to raise on its own motion, issues which heretofore are not addressed. This line of argument is the primary foundation for the doctrine of "fundamental error."

A state is free to regulate the procedure of its own courts in accordance with its own conception of policy and fairness. Snyder v. Massachusettes, 291 U.S. 97, 105, 54 S.Ct. 330, 332, 78 L.Ed.2d 674 (1934). The State would assert that the Oklahoma Court of Criminal Appeals looked at the entire record and concluded on its own motion that the Petitioner failed to show standing,

which is a necessary aspect under the Oklahoma procedure. Furthermore, this determination is an issue of state law and should not be disturbed since this does not concern an issue of constitutional dimension. Wainwright v. Goode, ___ U.S. ___, 104 S.Ct. 378, 382, 78 L.Ed.2d 187 (1983); Engle v. Isaac, 456 U.S. 107, 102 S.Ct. 1558, 71 L.Ed.2d 783 (1982).

Therefore, since the requirement for the criminal defendant to show standing in Fourth Amendment questions remains a state issue, and since this determination is founded on Rakas, the State would suggest that the decision should not be disturbed. Additionally, even though the Court below raised the issue sua sponte, the opinion is not faulty since it is within the Court's

domain to raise such issues for the purpose of furthering justice.

CONCLUSION

For the reasons stated, it is respectfully requested that the Petition for a Writ of Certiorari be denied.

Respectfully submitted,

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